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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1954

ALLEGHANY CORPORATION, INVESTORS SYNDICATE OF AMERICA, INC. and INVESTORS DIVERSIFIED SERVICES, INC.,
Petitioners,
against
JAMES FOUNDATION OF NEW YORK, INC.,
Respondent.

No. 430

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Questions Presented

The questions presented by the petition may be summarized as follows:

1. Whether the Court of Appeals correctly interpreted the voting trust agreement and Interstate Commerce Commission decision as not authorizing Alleghany, without prior Commission approval, to purchase and trustee controlling stock of any number of carriers;

2. Whether the Court of Appeals properly held that the District Court's finding of Alleghany's purpose to acquire control of Western Pacific was warranted and necessarily rejected contrary testimony.

The questions raised are not substantial. The decision of the Court of Appeals turned on its interpretation of a particular instrument and I. C. C. decision, and also on a

narrow issue of disputed fact. It encroaches neither upon the functions of the I. C. C. nor of the District Court. It affects only the litigants and has no general application.

The decision was also correct for the additional reason, not passed upon by the Court of Appeals, that no contract for the sale of the stock was made, as the District Court held.

Statement

The action sought specific performance or damages for breach of alleged contracts for the sale to petitioners of respondent's entire holdings of stock (153,165 shares of common and 55,727 shares of preferred) of The Western Pacific Railroad Company. The final (third amended) complaint alleged that the contracts were made on either of two different dates, at either of two different prices, and that they required delivery of all the common stock to Alleghany, against payment, on the third business day thereafter (R. 49-55).

The claim for specific performance was based on allegations that respondent's common and preferred stock, both having voting rights, together constituted approximately 28.7% of the entire voting stock; that the common stock was approximately 21.5% of the entire voting stock and "could afford to its owner practical control"; and that Alleghany purchased the common because of "the qualities of control which it possessed" and acquired assignments of the alleged contracts to purchase the preferred in order "to increase said voting power" (R. 52-53).

Respondent's answer denied the making of the alleged contracts and pleaded as affirmative defenses the statute of frauds and Alleghany's failure to obtain prior approval by the I. C. C. as required by Section 5 of the Interstate Commerce Act (R. 65-66).

After trial without a jury in which respondent rested on petitioners' case (R. 1026-27), the District Court (Ryan J.) concluded that the persons with whom petitioners deal

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had no authority to bind respondent, and accordingly held that respondent had made no contracts with petitioners (R. 30-31). It was thus unnecessary for the District Court in its opinion (R. 6-40, reported at 115 F. Supp. 282) to pass on the affirmative defenses. The District Court gave judgment for respondent with costs and disbursements (R. 4-5, 40).

In its opinion (appendix* pp. 1100-08, reported at 214 F. 2d 446) the Court of Appeals (Chase, Frank and Hincks, JJ.) assumed, *arguendo*, that the alleged contracts had been made and did not violate the statute of frauds. It nevertheless unanimously affirmed the judgment, holding that Alleghany, since it already controlled the Chesapeake & Ohio Railroad, could not lawfully acquire control of Western Pacific without first obtaining approval of the I. C. C. as required by Section 5, and that "Alleghany could not lawfully have become owner of the stock within the required period and therefore would have been unable to perform the contract with the James Foundation." (appendix p. 1105). It also held, contrary to petitioners' contention, that the Commission's decision in *In re Chesapeake & Ohio Railway Company Purchase Etc.*, 261 I. C. C. 239 "did not give advance approval of any future purchase by Alleghany of the controlling stock of any railroad, provided only Alleghany deposited the stock with the Chase National Bank under the trust agreement * * *" (appendix p. 1107).

Petitioners applied for rehearing on two grounds, one of law and the other of fact. They contended that the Court of Appeals had misconstrued the Commission's decision and the voting trust agreement therein approved (appendix p. 1114). They further contended that "Alleghany planned immediately on purchase to deposit the stock under the trust deed" (appendix p. 1113).

The Court of Appeals requested respondent to answer the petition for rehearing and propounded four questions

* The appendix to the certified record is herein referred to as "appendix."

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to both petitioners and respondent.* The first question was whether an inference that Alleghany intended to deposit the stock under the voting trust agreement was consistent with the allegations of the amended complaint, the testimony of Young, and the District Court's finding that Alleghany's purpose "was to acquire control of Western." The second question was whether, since Alleghany represented that it was not purchasing with a view to distribution, the inference was justified that Alleghany could realize the value of control only by itself exercising that control. The remaining questions dealt with I. C. C. decisions, specific performance, and damages.

The Court of Appeals denied the petition for rehearing in an opinion (appendix pp. 1169-80, reported at 214 F. 2d 451) which fully reviewed the I. C. C. decisions relied on by petitioners. The Court adhered to its original holding that "'Section 5 of the Interstate Commerce Act precludes the entry of any blanket Commission order approving further control acquisitions of any unnamed railroad whatsoever'" and observed that "Only the most unequivocal statement by the Commission would induce us to believe that it had entered such a blanket order." (appendix p. 1174). While stating that this determination disposed of the petition, the Court also considered the issue of Alleghany's intent. Noting that that issue was raised by the pleadings and the evidence, the Court held the District Court's finding that Alleghany's purpose "was to acquire control" amply supported by the evidence, and with respect to testimony of an intent to trustee the stock said: "We think the trial judge could properly refuse (as he obviously did) to credit the oral testimony on the subject, introduced by Alleghany, of witnesses he saw and heard." (appendix pp. 1174-78).

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* The Court's questions are not included in the appendix to the certified record but are printed at pp. 22-23 of the appendix to the petition for certiorari.

ARGUMENT

I

The Court of Appeals properly interpreted the voting trust agreement and the I. C. C. decision.

Petitioners apparently assume that because the I. C. C. is charged with enforcement of the Interstate Commerce Act, any conflict between its interpretation of Section 5 and the interpretation thereof by a Court of Appeals would warrant review by this Court. But it is well settled that the I. C. C.'s interpretations of the Act it administers, although entitled to weight, are not binding on the courts. *Railway Labor Ass'n* v. *U. S.*, 339 U. S. 142, 154 (1950); *I. C. C.* v. *Railway Labor Ass'n*, 315 U. S. 373, 380 (1942), *Texas and Pacific Ry. Co.* v. *U. S.*, 289 U. S. 627, 640 (1933).

In any event, the asserted conflict with the I. C. C. does not exist.

Basic to petitioners' contention that conflict exists is their statement that the Court of Appeals held that "a deposit of stock in a voting trust approved by the Interstate Commerce Commission does not prevent the beneficial owner from acquiring control of a carrier." (petition pp. 2, 11). What the Court actually held was that the deposit by Alleghany with the voting trustee of controlling shares of any un-named railroads was not authorized by the voting trust agreement or by the I. C. C. decision approving that agreement (appendix pp. 1174, 1179-80).

This holding was made in response to Alleghany's contention that the trust agreement and I. C. C. decision permitted it to purchase and trustee controlling shares of Western Pacific. The only source of the authority asserted by Alleghany is the provision in the trust agreement that Alleghany will trustee "all voting stocks of carriers * * * which it may hereafter acquire" other than stocks of Chesapeake & Ohio affiliates. (Pl. Ex. 9; R. 430, 1048). The argument assumed that "all voting stocks" included controlling blocks. Thus it was Alleghany's position that the I. C. C. had authorized it to purchase and trustee control-

ling blocks of as many carriers as it desired, and the Court of Appeals properly so described Alleghany's position (appendix pp. 1169-70).

The rejection of this contention was plainly required by the terms of the I. C. C. decisions cited to the Court of Appeals by petitioners, including 261 I. C. C. 239, the only one on which they now rely. In addition to the Court's careful analysis of those decisions (appendix pp. 1170-74, 1179-80), other considerations demonstrate the correctness of the Court's refusal to hold that the very instrument which restricted Alleghany to control of the Chesapeake & Ohio system carried within it a license for Alleghany to acquire and trustee controlling stock of any number of un-named railroads without further leave of the I. C. C.

The trust agreement provided that Alleghany would trustee all voting stocks of carriers except those of the Chesapeake & Ohio system which it might thereafter acquire "unless acquisition thereof is expressly approved by the Commission * * *." (Pl. Ex. 9; R. 430, 1040). The only carrier stock whose acquisition requires I. C. C. approval is controlling stock (49 U. S. C. § 5). Controlling stock was thus excepted from the scope of the trust agreement. The exception was clearly intended to reserve all questions relating to the acquisition of controlling stock of other carriers for proceedings under Section 5(2), in accordance with Alleghany's express assurances to the Commission that it intended to limit its control of carriers to the Chesapeake & Ohio and affiliates "subject to the right of Alleghany to apply for control of such other carrier or carriers as it may consider to be in the public interest." (261 I. C. C. 239, 241).

If petitioners' views of Alleghany's authority were correct, illegal acquisitions of control and violations of the Act by the voting trustee would result. The prohibition against acquisition of control of more than one carrier without I. C. C. approval extends to "any person" (49 U. S. C. § 5(4)). It was just as illegal for the voting trustee as for Alleghany to acquire such control without I. C. C. approval.

The Commission did not authorize future control by the voting trustee of two or more carriers because it lacked power to do so. Section 5 requires that approval of any acquisition of control within the specified categories shall be given by the Commission only after notice to interested parties, a hearing, and a finding that the proposed acquisition will be in the public interest. The statute thus precludes any blanket, advance approval of acquisitions of control of un-named carriers, having unknown effects upon the public interest.

II

The Court of Appeals properly held that the District Court's finding of Alleghany's purpose was unwarranted by the evidence and was a rejection of contrary testimony.

Petitioners claim that in rejecting their contention on rehearing that Alleghany intended to trustee the stock the Court of Appeals either (a) improperly made a finding of fact as to the intent of witnesses, Young and Purcell, not made by the District Court and contrary to the witnesses' uncontradicted testimony (petition p. 2); or (b) "unreasonably described" the District Court's finding, which they assume was correct (petition p. 6), that the purpose of Alleghany "was to acquire control" (petition pp. 7, 8, 13).

The Court of Appeals did neither. What it did was review the evidence and hold the District Court's finding amply supported. It thus rejected an assertion of fact inconsistent with the finding, which the District Court necessarily had rejected in making that finding.

The question of Alleghany's intent was not, contrary to petitioners' assertion (petition pp. 7-8), raised for the first time by the Court of Appeals itself on rehearing. Evidence on the point was adduced at the trial and passed on by the District Court.

The evidence included the interested, post factum testimony of Young and Purcell to the effect that during their negotiations they had expressed to each other intentions

of trusteeing the stock (R. 339, 402-03). This is the sole evidence to which petitioners point in support of their contention (petition p. 9). That self-serving testimony was contradicted by Young's own admissions that Alleghany was "buying control" (R. 259-60, 309), and by other testimony as to Alleghany's arrangements to deposit the Western Pacific common stock, not voting trust certificates, as collateral under bank loans (R. 399, 402, 467-68, 513-14, 701-02, 708). It was also contradicted by contemporaneous writings, including a resolution of Alleghany's executive committee authorizing the purported purchase (Pl. Ex. 6, not printed), the purported contract of sale signed by Alleghany (Pl. Ex. 52; R. 664, 1069-71), and the letter of Alleghany's attorneys, authorized by Young, demanding delivery of the shares (Pl. Ex. 50; R. 632, 1066-68). All these documents, made at the time, are significantly silent as to trusteeing. The evidence on this point is accurately summarized in the opinion of the Court of Appeals (appendix pp. 1174-78) and need not here be repeated.

On all the evidence the District Court found—a material finding on the issues tried—that "The purpose of Alleghany in offering to purchase the James Western common stock was to acquire control of Western * * *" (F. 58, R. 29). The Court of Appeals held this finding amply supported by the evidence (appendix p. 1105). Petitioners concede it was correct (petition p. 8).

The District Court's finding necessarily meant that it rejected the testimony of Young and Purcell as to intent to trustee the stock. It was not required to make an express finding rejecting their testimony or credibility. See *Kelley* v. *Everglades Drainage District*, 319 U. S. 415, 422 (1943). Had it accepted their testimony it could not have found that Alleghany's purpose was to acquire control. An intent to trustee and a purpose to control were mutually exclusive.

As the Court of Appeals pointed out, it was the District Court which refused to credit the oral testimony of Young

and Purcell as against substantial evidence to the contrary (appendix p. 1178). In this there was plainly no violation of Rule 52. As this Court said in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 396 (1948), where oral testimony as to intent "is in conflict with contemporaneous documents we can give it little weight • • •".

CONCLUSION

The questions raised by the petition are without merit. The petition lacks substantial grounds and should be denied.

Respectfully submitted,

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